Matthew R Friedman
202 429 6459
mfriedman@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

Steptoe
STEPTOE & JOHNSON LLP

REDACTED – FOR PUBLIC INSPECTION

August 1, 2019

BY ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **beIN Sports, LLC v. Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384; File No. CSR-8972-P**

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,[1] beIN Sports, LLC ("beIN") submits the enclosed public redacted version of its Emergency Application for Review dated August 1, 2019.

beIN has denoted with "{{ }}" Highly Confidential Information taken from or derived from the Highly Confidential Information in the Media Bureau's July 2, 2019 order ("*Order*") dismissing in part and denying in part beIN's December 13, 2018 complaint against Comcast Cable Communications, LLC and Comcast Corporation (collectively, "Comcast")[2] or in Comcast's Answer. beIN has also denoted with "[[ ]]" beIN Confidential Information and Comcast Confidential Information taken from or derived from the *Order* or the pleadings in this proceeding. A Highly Confidential version of this filing and a Confidential version of this filing

[1] beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC and Comcast Corporation, Defendants, Request for Enhanced Confidential Treatment, *Order*, MB Docket 18-384, DA 19-65 (Feb. 8, 2019) ("*Protective Order*").

[2] beIN Sports, LLC v. Comcast Cable Communications, LLC, and Comcast Corporation, *Memorandum Opinion and Order*, MB Docket No. 18-384, DA 19-623 (July 2, 2019) ("*Order*").

are being simultaneously filed with the Commission. A separate copy of the Highly Confidential version is being served upon the Media Bureau pursuant to the *Protective Order*.

Please contact me with any questions.

Respectfully submitted,

/s/
Matthew R. Friedman
Counsel to beIN Sports, LLC

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	
	)	File No. CSR-8972-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC,	)	
and	)	
COMCAST CORPORATION,	)	
Defendants.	)	

EMERGENCY APPLICATION OF BEIN SPORTS, LLC FOR REVIEW

August 1, 2019

REDACTED – FOR PUBLIC INSPECTION

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	
	)	File No. CSR-8972-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC,	)	
and	)	
COMCAST CORPORATION,	)	
Defendants.	)	

EMERGENCY APPLICATION OF BEIN SPORTS, LLC FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, beIN Sports, LLC ("beIN") respectfully requests that the Federal Communications Commission ("FCC" or "Commission") review the Media Bureau's July 2, 2019 order in the above-captioned proceeding ("*Order*").[1] The Bureau's decision dismisses with prejudice in part and denies in part beIN's December 13, 2018 complaint (the "Second Complaint") against Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast").[2]

I. SUMMARY

After more than a year of litigation at the *prima facie* stage of a program carriage complaint, the Bureau finally agreed with beIN that beIN had successfully made a *prima facie* case of discrimination under the rules against Comcast. The Bureau agreed there was sufficient evidence that: beIN's main programming network is similarly situated to Comcast's NBC Sports

[1] *See* beIN Sports, LLC v. Comcast Cable Communications, LLC, and Comcast Corporation, *Memorandum Opinion and Order*, MB Docket No. 18-384, DA 19-623 (July 2, 2019) ("*Order*").

[2] Program Carriage Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC, and Comcast Corporation, MB Docket No. 18-384 (Dec. 13, 2018) ("Second Complaint").

Network ("NBC Sports" or "NBCSN")—both networks are sports-focused and soccer-centric; Comcast discriminated against beIN and in favor of its affiliate NBC Sports; and, in doing so, Comcast unreasonably restrained beIN's ability to compete fairly. What remained was to refer the proceeding to the Commission's Administrative Law Judge ("ALJ") for the merits stage, as has been done with every other complaint where the Bureau determined that a *prima facie* case had been made. But this was not to be. In an unprecedented departure from Commission precedent, the Bureau took it upon itself to decide the merits, ruling that Comcast's action was based on legitimate commercial considerations. The Bureau's summary disposition of the merits flouts the Administrative Procedure Act ("APA"), would nullify the Communications Act's program carriage provision and the will of Congress, and offends the Constitution to boot.

The Bureau's finding of legitimate commercial reasons was solely based on Comcast's say-so, without giving beIN any opportunity for discovery. What is more, the Bureau placed beIN in a "Catch-22" that violates not only the APA, but also the Constitution and fundamental fairness: it accepted Comcast's position because beIN had not offered evidence that the Bureau itself prevented beIN from obtaining. Here is what the Bureau said: "A rather obvious type of proof would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried [the network] more broadly or that Y number would leave Comcast in the absence of broader carriage, or a combination of the two, such that Comcast would recoup the proposed increment in cost."[3] That type of proof would indeed be obvious, but it is unavailable to beIN without discovery: there is only one source of information for both the X and Y subscriber numbers referenced by the Bureau, and that is Comcast itself. The Bureau placed

[3] *See Order* ¶ 28 n.113 (quoting *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 986 (D.C. Cir. 2013) ("*Tennis Channel*")).

beIN in the same untenable predicament when it stated: "beIN Sports disputes Comcast's data as a proper measure; however, it fails to quantify the ways in which it disputes Comcast's data." *Order* ¶ 27 n.105. Outside a thorough review of Comcast data through a merits hearing, beIN cannot quantify how many Comcast subscribers left the Sports and Entertainment package. The *Order* ties beIN's hands and rules against beIN because its hands are tied.

What is more, the Bureau mistakenly focused on the terms proposed by beIN and whether Comcast would have "reason to expect a net benefit" under them. The question raised by the Second Complaint was whether *Comcast's offer* was unlawfully discriminatory. Comcast never submitted an analysis showing that it stood to lose money from providing beIN to a broader set of Comcast subscribers.

Crucially, the Bureau chose to believe Comcast's evidence of supposedly legitimate business reasons even though it was directly belied by Comcast's own actions. In 2015, Comcast [[ ]] meaning that, contrary to the Bureau's finding, Comcast did not think then that it "had already been overpaying for carriage of the beIN Sports networks under the expired terms of the program carriage agreement…." *Id.* ¶ 27. And, if Comcast's analysis of its supposed losses were correct, Comcast would be losing money under its own December 13, 2017 offer to beIN. In agreeing with Comcast, the Bureau accepts Comcast's suggestion that Comcast, a public company with an obligation to shareholders, goofed up in making that offer and was later surprised to learn how much money its own offer would have cost.[4] This is absurd and will not withstand even the

[4] Answer to Complaint of Comcast Cable Communications and Comcast Corporation, MB Docket No. 18-384, ¶ 6 (Feb. 11, 2019) ("Comcast Answer").

lightest scrutiny under the APA. Furthermore, Comcast does not even assert that it applies the same analysis to NBC Sports.

In a basic administrative law violation of the APA, the Bureau did not even acknowledge most of beIN's objections to Comcast's analysis, let alone explain why it was not convinced by them. beIN and its expert witness presented no less than six reasons why Comcast's analysis was invalid. Five were met with silence. And the Bureau's dismissal of the one objection that the Bureau did discuss was illogical: the Bureau mistakenly believed that, to evaluate Comcast's subscriber losses from discontinuing beIN's carriage, it had to choose one or the other category of departing subscribers (those leaving Comcast altogether and those leaving the Sports and Entertainment package). But this is not an either/or proposition. Comcast's losses are the sum total of both kinds of departures. Comcast provides no evidence at all about how many customers left the Sports and Entertainment package or other impacts to Comcast's business as a result of Comcast's unilateral decision to deprive customers of beIN's programming.

The Bureau's treatment of one of beIN's experts, Eric Sahl, takes one step further the Catch-22 theme that characterizes the decision: once more, the Bureau found that beIN had failed to adduce evidence that the Bureau had prevented beIN from obtaining. Mr. Sahl qualified for access to Highly Confidential Information under the plain meaning of the *Protective Order*,[5] as his [[ ]] at the time did not compete with either Comcast or NBCUniversal. The Bureau was wrong to deny him access and prevent him from rebutting Comcast's analysis on reply. The Bureau's unduly broad reading of the *Protective Order* would disqualify most

[5] beIN Sports, LLC, Complainant, v. Comcast Cable Communications, LLC and Comcast Corporation, Defendants Request for Enhanced Confidential Treatment, *Order*, MB Docket No. 18-384 (Feb. 8, 2019) ("*Protective Order*").

industry experts, since their expertise can only be gained by interactions in an industry dominated by Comcast.

Finally, in concluding that beIN en Español ("beIN-E") and Universo are not similarly situated, the Bureau ignores or misapplies relevant factors to that analysis, including the self-description of Universo as a sports network, significant audience overlap, similar marquee programming, identical median viewer age, and comparable coverage ratings.

These are not subtle violations to be unearthed by parsing the Bureau's decision; they sit on its face. They were committed even though the Bureau acknowledged the harm to beIN: Comcast has unreasonably restrained beIN's ability to compete fairly. Having that ability, of course, is the difference between life and death for an independent programmer. beIN therefore asks the Commission that justice be done and that its harm be redressed by a proper evaluation of the merits consistent with the invariable precedent of conducting further proceedings once a complainant succeeds in making a *prima facie* case.

beIN also prays for speed. The harm that the Bureau recognized is compounded by the day. By denying beIN access to Comcast's cable systems, Comcast creates a lethal handicap compared to NBC Sports. In fact, the harm will rise dramatically if there is no action by the Commission by October 15, 2019.[6] Specifically, October 27, 2019 is the date of El Clásico—the historic Barcelona vs. Real Madrid rivalry match—one of only two every season and the highlight of the La Liga season. El Clásico is a particularly unique opportunity for beIN in light of the drama surrounding Real Madrid's effort to regenerate itself with young virtuosos after a string of heavily-publicized disappointments that reached a crescendo with a 7-3 defeat to

[6] Declaration of Antonio Briceño in Support of Request for Expedited Treatment ¶ 3, attached as Exhibit 1 ("Briceño Decl.").

Atlético Madrid.[7] The world, including fans in the U.S., is waiting, except that beIN will be materially unable to deliver. El Clásico will soon be followed by the November 9, 2019 and November 23, 2019 finals for the Copa Sudamericana and Copa Libertadores, respectively, which are the two most prestigious international tournaments for South American soccer clubs. Diminished reach for beIN during these events irreparably impairs beIN's ability to maintain rights to such high-value content and compete for advertising dollars with NBC Sports and other similarly situated sports networks. beIN pleads with the Commission that it act by October 15, 2019 in order to forestall a heavy impairment of the company's prospects in the U.S. and the loss of competition in the provision of sports programming and compelling content for U.S. soccer fans. Briceño Decl. ¶ 4.

In addition, beIN requests that the Commission convert the status of the proceeding from restricted to "permit-but-disclose" to allow the more flexible presentation of the parties' and others' views to the Commission. This application for review involves "primarily issues of broadly applicable policy." 47 C.F.R. § 1.1208 n.2. The implications of this proceeding are broad, and go beyond the parties and the confines of this proceeding. Every soccer fan should care about Comcast's cold, and now adjudicated, discrimination. Comcast's actions have resulted in millions of people being denied access to the games of Barcelona, Real Madrid, and Paris Saint-Germain, and the skills of Messi, Vinicius Junior, and Neymar.

The Bureau's actions also have broad resonance for a precedential reason: if the invocation of untested business reasons is all it takes to defeat any claim of discrimination, then the program carriage ban on such discrimination is dead letter. The *Order* vitiates Congress'

[7] Tariq Panja, *Old Friends and Family Recipes Fuel a Real Madrid Prodigy*, New York Times (July 26, 2019), https://www.nytimes.com/2019/07/26/sports/vinicius-real-madrid.html.

intent in passing Section 616—to prohibit vertically-integrated cable operators from acting on their "incentive and ability to favor their affiliated programmers."[8] Under the Bureau's approach, the program carriage standard would become equivalent to heads the defendant wins, tails the complainant loses. The only question about the outcome would be which way the complainant would lose—whether by failing to make a *prima facie* case or by colliding with Comcast's unanswerable objection that it did bad things for good reasons. This action begs for reversal by the Commission, and is likely to be overturned by the courts if review is denied.

II. BACKGROUND

beIN and beIN-E are sports programming networks that primarily distribute top-flight European soccer, currently including games of the Spanish La Liga, French Ligue 1, and Turkish League, as well as the Copa Libertadores and the Copa Sudamericana. beIN's English-and Spanish-language programming also includes, or has recently included, sports-related news and original programming, motor sports, college sports, rugby, track and field, combat sports, Conference USA football matches, and multiple boxing promotions. beIN is unaffiliated with any multichannel video programming distributor ("MVPD"). Today, beIN receives distribution from large non-vertically-integrated MVPDs.

beIN first launched on Comcast in August 2012. The initial agreement was for [[

]] On April 11, 2017, beIN submitted a renewal proposal to Comcast. After about seven months, Comcast responded on December 13, 2017 with a renewal offer that would, among other things, [[

[8] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460.

]] These terms were discriminatory compared with those Comcast makes available to its own programming affiliates, NBC Sports and Universo.

On March 15, 2018, beIN filed a complaint, alleging that Comcast's December 13, 2017 offer for carriage constituted unlawful discrimination in violation of Section 616 of the Act, Section 76.1301(a) of the Commission's rules, and conditions placed on Comcast by the *Comcast-NBCU Order*.[9] On August 2, 2018—one day after expiration of the beIN-Comcast carriage agreement and Comcast's dropping of beIN—the Bureau issued an order dismissing beIN's complaint without prejudice, on the grounds that beIN failed to provide a sufficient "degree of certainty about the programming that would be featured" to support its claim that it is "similarly situated" to Comcast-affiliated networks NBC Sports and Universo and that Comcast treated beIN differently from these affiliated networks with respect to the selection, terms, or conditions of carriage.[10]

Subsequent to this dismissal, and in response to beIN's efforts to get its programming back on the screens of Comcast's subscribers, [[

]] On December 13, 2018, beIN filed the Second Complaint, which was tailored to address specifically the concerns expressed by the Bureau in the *August 2 Order*.

III. STANDARD OF REVIEW

Applications for review must state the questions presented for review. 47 C.F.R. § 1.115(b)(1). These questions are:

[9] Complaint of beIN Sports, LLC against Comcast Cable Communications, LLC, and Comcast Corporation, MB Docket No. 18-90 (Mar. 15, 2018).

[10] beIN Sports, LLC v. Comcast Cable Communications, LLC, and Comcast Corporation, *Memorandum Opinion and Order*, 33 FCC Rcd. 7476, 7480-81 ¶¶ 14-15 (2018) ("*August 2 Order*").

- Whether the *Order* erred as a matter of law by finding on the merits, based only on the pleadings, that Comcast did not violate the program carriage rules even though beIN had made a *prima facie* case of unlawful discrimination;

- Whether the *Order* erred as a matter of law by creating an unlawful "Catch-22," faulting beIN for not providing evidence that it could only obtain through discovery, while also preventing beIN from engaging in any discovery;

- Whether the *Order* erred as a matter of law by crediting Comcast's showing that the carriage of beIN at the compensation proposed by beIN would lose Comcast money, ignoring the irrelevance of that showing, and disregarding beIN's objections to that analysis;

- Whether the *Order* erred by ignoring the lack of evidence that broader distribution of beIN would lose Comcast money;

- Whether the *Order* erred by concluding that Comcast's customer losses from not carrying beIN were small, while failing to account for the losses of customers from Comcast's Sports and Entertainment package where beIN was carried;

- Whether the *Order* erred by finding that, on the one hand, beIN and NBC Sports are similarly situated, but on the other, broader carriage of beIN on the same tier as Comcast distributes NBC Sports would be "dubious" because beIN "appeals to a niche audience";

- Whether the *Order* erred by concluding that beIN failed to provide sufficient evidence that beIN-E and Universo are similarly situated;

- Whether the *Order* erred by concluding that there was no violation of the Comcast-NBCU conditions in light of its other erroneous holdings;

- Whether the Bureau erred by denying beIN's programming expert, Mr. Eric Sahl, access to Comcast's highly confidential evidence; and

- Whether the *Order* violated beIN's right to due process.

Applications for review must specify with particularity, among five enumerated factors, the factors that warrant Commission consideration of the questions presented.[11] These five

[11] 47 C.F.R. § 1.115(b)(2); *see also* Spectrum Networks Group, LLC, *Memorandum Opinion and Order*, WT Docket No. 14-100, FCC 18-173, ¶ 7 (Dec. 10, 2018); *see also* Saga Communications of New England, L.L.C., *Order on Review*, 26 FCC Rcd. 16678, 16680 ¶ 6 (2011).

factors are whether the Bureau's decision (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves application of a precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error. 47 C.F.R. §§ 1.115(b)(2)(i)-(v). As explained in greater detail below, the *Order* conflicts with the Constitution, the Act, the Commission's regulations, Commission precedent and policy, and commits a prejudicial procedural error. 47 C.F.R. §§ 1.115(b)(2)(i), (v).

IV. THE BUREAU'S DISMISSAL WAS ERRONEOUS AS A MATTER OF LAW

A. The Bureau's rush to a decision on the merits at the same time it found that beIN had successfully made a *prima facie* case was wrong and unprecedented.

After finding that beIN has demonstrated a *prima facie* case of discrimination as to the beIN network, the Bureau took it upon itself to decide—without any hearing or opportunity for discovery—that the record failed to show that Comcast discriminated against beIN on the basis of affiliation or non-affiliation. The Bureau made that decision regardless of whether or not Comcast holds the burden of proof to demonstrate that it acted based on legitimate and non-discriminatory business reasons. *Order* ¶ 26 n.93. While the Commission's rules contemplate that the Bureau will rule on the merits of a complaint based on the pleadings and without discovery "if the Media Bureau determines that the complainant has made a *prima facie* showing and the record is sufficient to resolve the complaint,"[12] the Bureau has never previously found a

[12] Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order, and Notice of Proposed Rulemaking*, 26 FCC Rcd. 11494, 11498 ¶ 6

record to be sufficient to resolve the complaint on the merits without discovery. This is for good reason: "alleged violations of Section 616 . . . will require an evaluation of contested facts and behavior related to program carriage negotiations[.]"[13] Thus, the Commission anticipated that "staff will be unable to resolve most program carriage complaints on the sole basis of a written record . . ." and that "resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations." *Id.* Consistent with this, the Bureau had designated every prior proceeding where a complainant made a *prima facie* showing of discrimination for a hearing before an ALJ, even where, as here, the record contains detailed arguments by the defendant MVPD that its discrimination was justified based on "various legitimate and non-discriminatory reasons."[14]

In the single instance where the Media Bureau later reversed course after designating program carriage complaints for hearings and prematurely terminated the ALJ's hearings, the Commission reversed it. After designating program carriage complaints by WealthTV, MASN, and the NFL against Comcast and other cable operators for hearings before an ALJ,[15] the Bureau subsequently issued two orders finding that the ALJ's authority had expired, terminating the ALJ

(2011) ("*2011 Order"), vacated in part by Time Warner Cable, Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013).

[13] *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order*, 9 FCC Rcd. 2642, 2652 ¶ 24 (1993) ("*1993 Second Program Carriage Order*").

[14] Game Show Network, LLC v. Cablevision Systems Corp., *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 27 FCC Rcd. 5113, 5132 ¶ 28 n.166 (2012); The Tennis Channel, Inc. v. Comcast Cable Communications, LLC, *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 25 FCC Rcd. 14149, 14161 ¶ 19 n.101 (2010) ("*Tennis Channel HDO*").

[15] *See* Herring Broadcasting, Inc. d/b/a WealthTV, et al. v. Time Warner Cable Inc., et al., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787 (2008).

hearings, and providing that the Bureau would resolve the disputes without the benefit of an ALJ recommended decision.[16] The Commission, on its own motion, rescinded the Bureau's orders, reinstated the ALJ's authority, and directed the ALJ to proceed pursuant to the hearing designation orders, on the grounds that "the factual determinations required to fairly adjudicate [those proceedings] are best resolved through hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits . . . ."[17] The Bureau fails to distinguish the factual determinations necessary in this proceeding or explain why the record here falls within the minority of instances that the Commission anticipated would not require a hearing.

B. The *Order* creates an unlawful "Catch-22."

In concluding that Comcast would not receive a net commercial benefit from carriage of beIN, the Bureau faults beIN for not providing two specific types of evidence. First, the Bureau cites as instructive "a rather obvious type of proof" discussed in the D.C. Circuit's *Tennis Channel* decision that could have demonstrated a net commercial benefit for Comcast: "expert evidence to the effect that X number of subscribers would switch to Comcast if it carried [beIN] more broadly or that Y number would leave Comcast in the absence of broader carriage, or a combination of the two, such that Comcast would recoup the proposed increment in cost."[18] Separately, the Bureau notes that while beIN disputed Comcast's churn data as a proper measure, on the grounds that it only considers customers who dropped Comcast or Comcast video and

[16] Herring Broadcasting, Inc. d/b/a WealthTV, et al. v. Time Warner Cable, et al., *Memorandum Opinion and Order*, 23 FCC Rcd. 18316, 18317 ¶ 2 (2008); NFL Enterprises LLC v. Comcast Cable Communications, LLC, *Memorandum Opinion and Order*, 23 FCC Rcd. 18378, 18379 ¶ 3 (2008).

[17] Herring Broadcasting, Inc. d/b/a WealthTV, et al. v. Time Warner Cable, Inc., et al., *Order*, 24 FCC Rcd. 1581, 1582 ¶ 2 (2009).

[18] *Order* ¶ 28 n.113 (quoting *Tennis Channel*, 717 F.3d at 986).

disregards customers who dropped only the Sports and Entertainment and Latino tiers, it "fails to quantify the ways in which it disputes Comcast's data." *Order* ¶ 27 n.105. Both these types of evidence derive from internal Comcast data that beIN cannot access except through discovery. Only Comcast can know how many subscribers joined Comcast when it introduced beIN in a market or package (the only basis for estimating the "X" number), and how many left when it dropped beIN (the "Y" number).[19] And only Comcast can "quantify" how many subscribers left the Sports and Entertainment package when Comcast dropped beIN. But the Bureau, in deciding the Second Complaint on the merits, precludes beIN from obtaining any discovery into this evidence. The Bureau is tying beIN's hands and faulting it for having its hands tied.

The record before the D.C. Circuit in *Tennis Channel* was extensive and complete. The parties "obtained and/or confirmed information through full discovery"[20] and submitted direct testimony, exhibits, and trial briefs.[21] The ALJ conducted a hearing involving testimony from four Tennis Channel witnesses, seven Comcast witnesses, and received *thousands* of documentary exhibits into evidence, *id.*, which evidence was "more complete, accurate, and reliable than the evidence considered by the Media Bureau in issuing the [hearing designation order]."[22] It is this type of "full evidentiary record," the Commission has recognized, upon

---

[19] [[

]]

[20] Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C., *Initial Decision of Chief Administrative Law Judge Richard L. Sippel*, 26 FCC Rcd. 17169, 17204 ¶ 100 (2011) ("*Tennis Channel ALJ Decision*").

[21] *See* Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C., *Memorandum Opinion and Order*, 27 FCC Rcd. 8508, 8515 ¶ 15 (2012) ("*Tennis Channel FCC Decision*").

[22] *Tennis Channel ALJ Decision*, 26 FCC Rcd. at 17204 ¶ 100.

which an adjudicator might conclude that a "defendant MVPD provide[d] legitimate and non-discriminatory business reasons . . . for its adverse carriage decision."[23] The record in this proceeding, consisting of solely a complaint, answer, and reply drafted with no opportunity for discovery, is far from full and is a sliver of the record in *Tennis Channel*. The Bureau errs by faulting beIN for not providing evidence that it could have provided only through discovery, and that the D.C. Circuit faulted Tennis Channel for not providing only after it had an opportunity for discovery and a full hearing. Thus, the Bureau's description of the necessary evidence confirms that the Bureau's order itself is the reason why that evidence is outside beIN's reach.

This error is compounded by the Bureau's conclusion that the record supports its finding regardless of what party bears the burden as to whether Comcast acted for a legitimate business reason. *See Order* ¶ 26 n.93. If beIN bears the burden, the need to engage in discovery of the Comcast internal data that Comcast used to support its contention that it acted for legitimate business reasons increases. Further, allowing Comcast to hide behind self-serving data, devoid of any obligation to provide other data that may contradict or even discredit that data relied upon, unfairly turns the tables to the defendant cable operator. On the other hand, if Comcast bears the burden of proof, then the strength of the evidence Comcast presents must be sufficiently strong. The evidence adduced by beIN discussed below, but which the Bureau ignores, demonstrates the existence of significant and material questions of fact, undercutting any claim that Comcast has met such a burden. The failure to resolve the question of burden was convenient, as either outcome would highlight the Bureau's error.

[23] Game Show Network, LLC v. Cablevision Systems Corp., *Memorandum Opinion and Order*, 32 FCC Rcd. 6160, 6179 ¶ 64 (2017).

C. The Bureau mistakenly credits Comcast's incredible suggestion that, in retrospect, Comcast made a huge mistake in carrying beIN.

The Bureau vindicated Comcast on a showing of business reasons that did not in fact pertain to the complained-of discrimination. Specifically, the Bureau found that "[i]n light of the 'clear negative' of an increased licensing fee, the failure to demonstrate any 'reason to expect a net benefit' from Comcast's continued carriage of beIN *on any of the terms proposed by beIN Sports* persuades us that Comcast 'made a decision based on its business interests regarding carriage.'" *Id.* ¶ 27 (emphasis added) (citations omitted). But that was not the question. The question was whether Comcast's December 13, 2017 offer was discriminatory. In the *Tennis Channel* case, Comcast had merely rejected a request by the programmer for broader carriage. *Tennis Channel*, 717 F.3d at 987. Here, by contrast, Comcast has made its own offer, which must be assessed on its own merits. Moreover, as the Bureau rightfully recognizes, Comcast's offer was discriminatory primarily because it would continue to place beIN on a lower penetration tier than the tier on which NBC Sports is carried. *Order* ¶ 23. Yet, Comcast supplied no evidence to show that it would lose money from broadening the distribution of beIN beyond the narrow distribution of its December 13, 2017 offer.

Importantly, the Bureau ignored what was obvious from the record: Comcast's analysis is directly belied by its actions. In 2015, Comcast [[

]] meaning that, contrary to the Bureau's finding, Comcast did not think then that it "had already been overpaying for carriage of the beIN Sports networks under the expired terms of the program carriage agreement . . . ." *Id.* ¶ 27. And, if Comcast's analysis of its supposed losses were correct, Comcast would be losing money under its own December 13, 2017 offer to beIN. Comcast is not a charitable foundation and has an obligation to its shareholders to make a profit. Comcast explains why it made an offer that it presents as loss-

making in the following terms: the viewership analyses it conducted after dropping beIN revealed, "even compared against Comcast's December 2017 Offer of [[ ]], …a still significant annual savings of {{ }} for Comcast." Comcast Answer ¶ 6. Comcast's explanation that it had goofed up in making that offer and was later surprised to learn how much money its own offer would have cost it is absurd. *Id.* Comcast wants the Commission to believe that it is an amateur: it was wrong not by a few cents but by an astounding {{ }} per year. The Commission's acceptance of that explanation would not withstand even the lightest scrutiny under the APA.

D. The Bureau fails to discuss evidence adduced by beIN that demonstrates the record contains significant and material factual disputes.

The Bureau provided two reasons to support its finding that Comcast's differential treatment of beIN and NBC Sports was based on non-discriminatory, legitimate business reasons: (1) a lack of evidence demonstrating that Comcast would benefit commercially from beIN's carriage; and (2) sufficient evidence provided by Comcast to establish that it would derive no commercial benefit from beIN's carriage, and that it could even suffer commercial harm from continued carriage. *Order* ¶ 26.

The *Order*'s denial of the Second Complaint on the merits, on these grounds, is significantly undercut by the Bureau's failure to discuss most of the evidence adduced by beIN that bears on the costs and benefits to Comcast from carriage of beIN. *Id.* ¶ 27. This evidence shows that the record contains significant and material questions of fact warranting resolution at hearing.[24] beIN presented no fewer than six objections to Comcast's analysis of its supposedly

[24] *See 2011 Order*, 26 FCC Rcd. at 11509 ¶ 21 ("[I]f the Media Bureau determines that disposition of the complaint or discrete issues raised in the complaint requires resolution of factual disputes or other extensive discovery in an adjudicatory proceeding, the Media Bureau

small losses from discontinuing carriage of beIN. Of these, five were met with silence. The Bureau's failure to account for this evidence is a telltale sign of a lack of reasoned decision-making under the APA.[25]

First, the Bureau ignores evidence that, contrary to the limited churn alleged by Comcast, beIN received 2.4 million visitors to its website dedicated to the dispute with Comcast since it was dropped by Comcast.[26]

Second, the Bureau ignores evidence that Comcast had denied its customers the benefit of [[ ]] *Id.* ¶ 118. This gratuitous behavior hurts both beIN and Comcast customers, helps Comcast's affiliated networks, and shows that Comcast is not genuinely interested in the popularity of beIN.

Third, the Bureau ignores significant evidence of Comcast [[

will refer the proceeding or discrete issues arising in the proceeding for an adjudicatory hearing before an ALJ."); *Tennis Channel HDO*, 25 FCC Rcd. at 14154 ¶ 10 ("[T]he existing record, including Comcast's Answer, makes clear that there are significant and material questions of fact warranting resolution at hearing.").

[25] *Global Tel*Link v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017) (holding FCC analysis of "record data . . . was not the product of reasoned decisionmaking" where it "does not account for [] conflicting record data" and vacating FCC order).

[26] Reply of beIN Sports, LLC to Answer of Comcast Cable Communications, LLC and Comcast Corporation, MB Docket No. 18-384, ¶ 13 (May 6, 2019) ("Reply").

]]

Fourth, the Bureau ignores testimony by beIN's economic expert, Dr. Hal Singer, that, "[t]o be economically meaningful, Comcast's implementation of the net benefit test should generate broadly consistent results across Comcast's portfolio of networks, including its affiliated networks." Reply, Exhibit 5 ¶ 29. Comcast provides no evidence that it applies the same net benefit test to its own affiliates, raising the issue of whether NBC Sports would similarly "fail" that test. *Id.*, Exhibit 5 ¶ 13. If Comcast does not derive a "net benefit" from carriage of NBC Sports under its own method, Comcast's differential treatment of beIN cannot be considered to have been based on legitimate business reasons.

Fifth, the Bureau ignores beIN's point that Comcast's differing representations in its answers to beIN's first program carriage complaint and the Second Complaint "justifies skepticism about other factual assertions that Comcast has made and mandates, at a minimum, discovery." Reply ¶ 18. In the former, Comcast had relied on "beIN's [[

]] *Id.* ¶ 16. In the latter, it revealed that NBC Sports provides less certainty than beIN did about the programming it offers. *Id.* While, as beIN noted, the "first phase of the program carriage process is necessarily limited in its factfinding potential as it is unaided by factual discovery…," *id.* ¶ 18, that limitation is especially acute in the face of such inconsistencies.

E. The Bureau illogically dismissed the one beIN objection to Comcast's benefits analysis that the Bureau did discuss.

The Bureau made a fundamental error of logic that is reversible under the APA in dismissing the one criticism that it acknowledged. Comcast had concluded that its customer losses from not carrying beIN were small, but did not count the losses from subscribers leaving

the Sports and Entertainment package, where beIN was carried. Comcast Answer ¶ 53. In defense of Comcast, the Bureau argues that taking account only of people dropping Comcast entirely was "the more appropriate measure" because beIN's "offer was conditioned on placement on tiers that [[

]] *Order* ¶ 27 n.105. This is a non-sequitur. The proper analysis is additive, not "either/or." Both subscribers leaving Comcast entirely and subscribers leaving the Sports and Entertainment package are relevant to the costs Comcast incurred as a result of its decision to drop beIN, and thus are a necessary factor in determining whether Comcast acted for legitimate, non-discriminatory business reasons. The *Order* is also internally contradictory.[27]

F. The *Order* erroneously concludes that that beIN failed to provide sufficient evidence that beIN-E and Universo are similarly situated.

A complainant can demonstrate that it is similarly situated through a "combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors." 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i). The Bureau's factual findings in support of its conclusion that beIN-E and Universo are not similarly situated ignore or misapply the relevant factors to the similarly situated analysis.

First, the Bureau is wrong to conclude that beIN-E and Universo are not in the same programming genre. The website Comcast launched as part of its campaign against beIN explicitly listed Universo as one of the "sports channels with tons of soccer" that is available to

[27] On the one hand, the Bureau correctly agreed that beIN provided sufficient evidence that beIN and NBC Sports are similarly situated, sharing key similarities in genre and target programming. *Order* ¶ 22. On the other hand, however, it questioned the benefits of broader carriage because beIN "appeals to a niche audience." *Id.* ¶ 28. But Comcast distributes the similarly situated NBC Sports on its broadest tiers, Reply ¶ 59, and NBC Sports appeals to a broad audience by anyone's reckoning.

Xfinity Internet customers. Second Complaint, Exhibit 14. While the Bureau credited Comcast's listing of NBC Sports as a source for soccer content toward demonstrating that NBC Sports is similarly situated to beIN, *Order* ¶ 22, the Bureau ignores this evidence as to beIN-E and Universo. The Bureau also ignores other record evidence of Universo describing itself as a "sports and entertainment network," not just an "entertainment network," Second Complaint ¶ 72, Nielsen's inclusion of Universo in its analysis of sports networks, Reply ¶ 66, the steep increase in the amount of soccer programming appearing on Universo, Second Complaint ¶ 84, the marquee nature of Universo's sports programming, Reply ¶ 45, and the fact that Universo's sports programming occurs primarily on the weekends when it directly competes with the soccer leagues featured on beIN. Second Complaint ¶ 26 n.25; *id.*, Exhibit 10 ¶ 19.

Second, the Bureau ignores evidence in the record showing that beIN-E and Universo have similar target audiences in ways far transcending their audiences' similar ethnic backgrounds. The median viewer age for the two networks is identical, and the median incomes are similar. Second Complaint ¶ 86. Nielsen data also show a significant, [[ ]] overlap in viewing households between beIN-E and Universo for the period between April 2017 and March 2018. *Id.* ¶ 90.

Third, while the Bureau correctly notes the similarity in common advertisers between beIN-E and Universo, the Bureau is wrong in stating that such evidence is the single applicable factor demonstrating that beIN-E and Universo are similarly situated. The record contains substantial evidence regarding two other factors—target programming and ratings. *Id.* ¶¶ 91-96.

V. THE BUREAU WRONGLY DENIED BEIN'S EXPERT ACCESS TO COMCAST'S HIGHLY CONFIDENTIAL EVIDENCE

On April, 5, 2019, the Bureau adopted by email an interlocutory order granting Comcast's objection to beIN's request for protective order access for its expert, Mr. Eric Sahl, on

the grounds that "granting Mr. Sahl access to Comcast's information designated as 'Highly Confidential' would be inconsistent with Paragraph 4 of the Protective Order."[28] The Bureau additionally concluded that its "action will not unduly prejudice beIN as Comcast has granted access to the 'Highly Confidential' information to five other experts hired to assist beIN in evaluating Comcast's Answer and formulating beIN's Reply," and that beIN "may also identify additional experts that can request access to Comcast's 'Highly Confidential' information in light of this ruling." *Id.* Except for limited circumstances that are inapplicable, "no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge." 47 C.F.R. § 76.10(a)(1). beIN now seeks review of the *April 5 Order* as part of this Emergency Application for Review.

Paragraph 4 of the *Protective Order* states, in relevant part, that outside counsel of record for the parties in this proceeding may disclose Highly Confidential Information to "outside consultants or experts retained for the purpose of assisting Outside Counsel of Record in this proceeding, provided that such outside consultants or experts are not employees of Complainant or Defendant and are not involved in the analysis underlying the business decisions of any competitor of the Submitting Party nor participate directly in those business decisions[.]" *Protective Order*, Appendix A ¶ 4. Mr. Sahl qualifies for access to Highly Confidential Information under the plain meaning of this language. As explained in beIN's opposition to Comcast's objection, Mr. Sahl's [[

[28] Email from Steven A. Broeckaert, Senior Deputy Chief, Media Bureau, FCC, to Matt Friedman, Counsel for beIN Sports, LLC, and Michael Hurwitz, Counsel for Comcast, MB Docket No. 18-384 (Apr. 5, 2019) ("*April 5 Order*").

]][29] Comcast additionally failed to explain why NBCUniversal, which is not a party to this proceeding, should be considered a "Submitting Party" for purposes of the *Protective Order*. *Id.*

The NBCUniversal affiliates that Comcast [[

]] are not owned by Comcast. *Id.* They simply broadcast NBC network programming. The fact that [[

]] Comcast does not state that [[

]] *Id.*

The *April 5 Order* also prejudiced beIN. Comcast did not oppose the requests for access to "Highly Confidential" information of four—not five—other people; one was for beIN's economic expert, Dr. Hal Singer; the other three assisted Dr. Singer. Dr. Singer, while familiar with programming carriage agreements and experienced in testifying for programmers in prior program carriage complaint proceedings, does not have the industry experience of Mr. Sahl. Further, beIN was prejudiced by the cost of retaining a new economic expert—Mr. Steven Sklar—and by the necessarily limited time available to Mr. Sklar to familiarize himself with this proceeding. While beIN was allowed a "reasonable extension," the damages inflicted upon it by Comcast's behavior prevented beIN from seeking a long delay. Mr. Sahl had been involved in the proceeding for more than a year, and his familiarity with the issues could not be replicated merely by a "reasonable extension." As a result, Mr. Sklar was unable to address Comcast's

[29] Opposition to Objection to Protective Order Access of beIN Sports, LLC, MB Docket No, 18-384, at 4 (Feb. 25, 2019) ("Opposition to Objection to Protective Order Access").

benefit analysis. Moreover, beIN is prejudiced in future proceedings. The Bureau's overbroad construction of the *Protective Order* would continue to disqualify not only Mr. Sahl, but most industry experts, for engaging in the type of activity needed to make them expert in the first place.

VI. THE *ORDER* VIOLATES BEIN'S CONSTITUTIONAL RIGHT TO DUE PROCESS

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[30] Administrative agencies must ensure that their procedures meet due process requirements. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Therefore, "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process."[31]

The Bureau's denial of the Second Complaint on the merits, with prejudice, deprived beIN of its due process right to be heard at a meaningful time and in a meaningful manner. As discussed above, the *Order* faults beIN for not providing evidence that beIN could only obtain through discovery into Comcast's internal data; at the same time, the *Order* itself prevents beIN from obtaining that evidence. As the Bureau recognizes, Comcast's discrimination has had the effect of unreasonably restraining beIN from competing fairly. *Order* ¶ 24. The harm to beIN [[

]] *Id.*

[30] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted).

[31] *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (citations omitted); *Southwest Airlines Co. v. TSA*, 554 F.3d 1065, 1074 (D.C. Cir. 2009).

Additionally, in contrast with *EchoStar*, where EchoStar broadly sought "corroborative evidence about the unfairness of Comcast's conduct, as well as Comcast's motives,"[32] beIN seeks (among other documents) a small set of documents that are uniquely relevant to beIN's case: the internal Comcast data that purport to show limited churn of the viewers who were able to receive beIN or beIN-E, which would have allowed beIN to provide the two specific types of evidence the Bureau faulted beIN for not providing. *Order* ¶ 28 n.113 (citing *Tennis Channel*, 717 F.3d at 986). By denying beIN a meaningful opportunity to discover the internal Comcast data that the Bureau relied on to support its decision, the Bureau severely deprived beIN of its single mechanism for legal recourse and amelioration of this harm.

VII. CONCLUSION

For these reasons, the Commission should expeditiously grant beIN's Emergency Application for Review, convert this proceeding to "permit-but-disclose" *ex parte* status, reverse the Bureau's findings, and designate the Second Complaint for a hearing before an ALJ as to whether Comcast unlawfully discriminated against beIN and beIN-E on the basis of affiliation or non-affiliation, and to determine the relief to be granted.

Respectfully Submitted,

/s/
Pantelis Michalopoulos
Markham C. Erickson
Matthew R. Friedman
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for beIN Sports, LLC

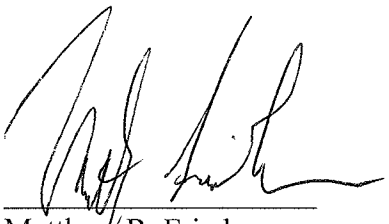
August 1, 2019

[32] *EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002).

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on August 1, 2019, I caused true and correct copies of the foregoing Emergency Application of beIN Sports, LLC for Review, as well as a copy of the redacted version electronically filed with the Federal Communications Commission this day, to be served by overnight mail (Highly Confidential Version) and electronic mail (Confidential Version and Public Version) on the following:

Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
Counsel to Comcast Corporation and
Comcast Cable Communications, LLC



Matthew R. Friedman
Steptoe & Johnson LLP

EXHIBIT 1

ANTONIO BRICEÑO DECLARATION IN SUPPORT OF REQUEST FOR EXPEDITED TREATMENT

I, Antonio Briceño, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge or based on information provided to me, in connection with the emergency application for review ("Emergency Application for Review") of the Media Bureau's July 2, 2019 order that dismisses with prejudice in part and denies in part the December 13, 2018 program carriage complaint of beIN Sports, LLC ("beIN") against Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast") and the effects of Comcast's discrimination against beIN.

2. I filed an initial declaration in this matter on December 13, 2018, which was included as Exhibit 8 to beIN's complaint. My qualifications are discussed in that declaration. I also filed a reply declaration in this matter on May 6, 2019, which was included as Exhibit 1 to beIN's reply.

3. The harm from Comcast's behavior to beIN is compounded by the day. By denying beIN access to Comcast's cable systems, Comcast creates a lethal handicap compared to NBC Sports. The harm to beIN will rise dramatically if the Commission does not grant beIN's Emergency Application for Review on or before October 15, 2019. Specifically, October 27, 2019 is the date of El Clásico—the historic Barcelona vs. Real Madrid rivalry match—one of only two every season and the highlight of the La Liga season. El Clásico is a particularly unique opportunity for beIN in light of the drama surrounding Real Madrid's effort to regenerate itself with young virtuosos after a string of heavily-publicized disappointments that reached a crescendo with a 7-3 defeat to Atlético Madrid. The world, including fans in the U.S., is waiting, except that beIN will be materially unable to deliver. El Clásico will soon be followed by the November 9, 2019 and November 23, 2019 finals for the Copa Sudamericana and Copa

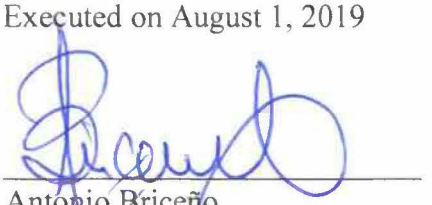
Libertadores, respectively, which are the two most prestigious international tournaments for South American soccer clubs. Diminished reach for beIN during these events irreparably impairs beIN's ability to maintain rights to such high-value content and compete for advertising dollars with NBC Sports and other similarly situated sports networks.

4. If the Commission does not act on beIN's Emergency Application for Review by October 15, 2019, the result will be a heavy impairment of beIN's prospects in the U.S. and the loss of competition in the provision of sports programming and compelling content for U.S. soccer fans.

* * * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge and belief.

Executed on August 1, 2019



Antonio Briceño
Deputy Managing Director,
US & Canada
beIN Sports, LLC